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No. 79-1965

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE COUNTY OF LOS ANGELES, ETC., ET AL.,
PETITIONERS

v.

F. RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether this suit, which seeks a declaratory judgment that the 1976 Amendments to the Federal Unemployment Tax Act providing for the extension under state law of unemployment compensation cover-

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[1] In addition to the Secretary of Labor, the federal respondents include the Secretary of the Treasury and the Commissioner of Internal Revenue. A list of the petitioners has been lodged with the Clerk.

age to state and local government employees (26 U.S.C. 3301 *et seq.*) violates the Tenth Amendment, and an injunction against the assessment and collection of federal unemployment taxes, is barred by the Declaratory Judgment Act (28 U.S.C. 2201–2202) and the Anti-Injunction Act (26 U.S.C. 7421(a)).

2. Whether Congress may condition the availability of federal unemployment tax credits for private employers and federal grants within a particular state upon the state's extension of unemployment compensation coverage to the employees of the state and its political subdivisions.

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OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. 32a–45a) is reported at 442 F. Supp. 1186. The district court's order of dismissal (Pet. App. 29a–31a) is unreported. The opinion of the court of appeals (Pet. App. 1a–6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980 (Pet. App. 7a). The petition for a writ of certiorari was filed on June 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Tenth Amendment to the Constitution of the United States and the relevant portions of the Federal Unemployment Tax Act of 1954 ("FUTA") (26 U.S.C. 3301–3311) are set forth at Pet. App. 48a–57a. Sections 3310 and 7421 of the Internal Revenue Code of 1954 (26 U.S.C.) and the Declaratory Judgment Act (28 U.S.C. 2201–2202) are set forth in the Appendix, *infra*, 1a–3a.

STATEMENT[2]

Petitioners are seven states and approximately 1,750 political subdivisions. They brought this action in

[2]The statement that follows is substantially the same as in our conditional cross-petition (No. 80–72) in this case. That petition seeks review of the jurisdictional question only if the Court grants the instant petition. If, as we submit (pages 5–13, *infra*), the Court should deny this petition, it should also deny that conditional petition.

the United States District Court for the District of Columbia seeking a declaratory judgment that the Unemployment Compensation Amendments of 1976, which provide for the extension under state law of unemployment compensation coverage to state and local government employees, are unconstitutional. These amendments provide for denial of tax credits against federal unemployment tax for private employers within a state which fails to extend unemployment compensation coverage to its employees. Petitioners also sought an injunction restraining the termination of tax credits for private employers and termination of federal grants that otherwise would result in states which refused to enact legislation conforming to the 1976 federal amendments (Pet. App. 32a–35a).

The statutory provisions at issue in this case operate as follows: Section 3304(a) requires the Secretary of Labor to approve any state unemployment compensation law which he finds conforms to the federal requirements set forth in that provision. Section 3304(c) requires the Secretary of Labor to certify to the Secretary of the Treasury each state whose law he has approved. This certification is to be made annually on October 31st. The certification of the Secretary of Labor is the prerequisite for tax credits for private employers subject to the state law and federal grants of money to the state.

Section 3301 currently imposes a tax on most private employers equal to 3.4% of the first $6,000 of wages paid to each employee.[3] In turn, Section 3302 permits

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[3] See 26 U.S.C. 3301(c) and 3306(b)(1).

the employer to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law.[4] This credit may not exceed 2.7% of such wages.[5] In any calendar year, however, an employer may claim this credit only if the state's unemployment compensation law "is certified as provided in section 3304 * * *" (26 U.S.C. 3302(a)(1)).

If the Secretary does not make the required certification on October 31, private employers within the state become ineligible for the FUTA tax credits for that year. An uncertified state also loses two kinds of federal grants related to unemployment. The first type of grant is for the costs of administering the state's unemployment compensation program.[6] The second type of grant is for the administration of public employment offices, which provide, for example, job-finding, placement and recruiting services.[7]

Section 115 of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2670-2671, amended 26 U.S.C. 3304(a)(6) and 3309(a)(1)(B) (Pet. App. 50a-55a) to require, as a condition for certification, that state law provide unemployment compensation coverage for state and local government employees on the same terms and conditions as state law covers private employees. These

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[4] 26 U.S.C. 3302(a)(1).

[5] See 26 U.S.C. 3302(a)(1), (c), and (d)(1).

[6] See Sections 301-303 of the Social Security Act, 42 U.S.C. 501-503.

[7] See Sections 1-12 of the Wagner-Peyser Act, ch. 49, 48 Stat. 113-117, 29 U.S.C. 49-49k.

amendments apply with respect to certifications of states for 1978 and thereafter, but only with respect to services performed after December 31, 1977. Section 115(d), 26 U.S.C. 3304 note.

The district court dismissed this suit for lack of jurisdiction (Pet. App. 29a–31a). It ruled that because the objective of petitioners' action was to enjoin the denial of Federal Unemployment Tax credits to employers located in states whose unemployment compensation laws do not conform to the requirements of the 1976 Amendments, the suit was barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. In its view, petitioners did not demonstrate that they were likely to succeed on the merits or that they would sustain irreparable injury in the absence of an injunction (Pet. App. 35a–45a). The district court also observed that petitioners had an adequate remedy at law. Pursuant to 26 U.S.C. 3310 (Appendix, *infra*, 1a–2a), any state that the Secretary of Labor determines not to be in conformity with the 1976 Amendments is entitled to seek judicial review of the Secretary's decision, and a stay of the Secretary's decision, in the court of appeals, and ultimately in this Court (Pet. App. 36a–37a).

The court of appeals affirmed per curiam the district court's dismissal of the complaint (Pet. App. 1a–6a). It did not, however, address the jurisdictional questions. Instead, it followed the decision of the First Circuit in *State of New Hampshire Dep't of Employment Security* v. *Marshall*, 616 F.2d 240 (1980), appeal pending, No. 79–1846 (filed May 20, 1980), in which the State of New Hampshire, on petition to review the Secretary's

discussion with respect to the statutes of that State, advanced the same constitutional challenge to the 1976 Amendments to the Federal Unemployment Tax Act. As the court of appeals noted, "the First Circuit addressed the Tenth Amendment contention and concluded that it was unavailing. We agree with the constitutional determination so made by the First Circuit, and adopt its reasoning as fully applicable to the consolidated appeals before us" (Pet. App. 5a; footnote omitted). Like the First Circuit, the court of appeals held that *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), is distinguishable because conformity with the 1976 Amendments is "voluntary and wholly optional" (Pet. App. 6a).

ARGUMENT

1. For the reasons set forth at greater length in our conditional cross-petition (No. 80–72) in this case, the district court correctly held that this suit is barred by the Anti-Injunction Act and the Declaratory Judgment Act, Appendix, *infra*, 2a–3a. While the court of appeals did not address the jurisdictional defenses to petitioners' suit, they furnish an independent and fully sufficient basis for that court's affirmance of the district court's dismissal of the complaint. There is accordingly no need to pass upon the merits of petitioners' constitutional challenge to the 1976 Amendments to the Federal Unemployment Tax Act. See, *e.g.*, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 582 (1979).

2. The court of appeals correctly rejected petitioners' Tenth Amendment challenge to the 1976 Amend-

ments to the Federal Unemployment Tax Act. In so holding, it adopted the reasoning of the First Circuit on identical substantive issues. See *State of New Hampshire Dep't of Employment Security* v. *Marshall*, 616 F.2d 240 (1980), appeal pending, No. 79–1846 (filed May 20, 1980).[8]

a. The enactment in 1935 of the Social Security Act established the federal-state unemployment compensation system. The basic statutory system was described in this Court's decision in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), which upheld its constitutionality under Article I, Section 8, the Due Process Clause, and the Tenth Amendment to the Constitution of the United States. The basic system remains in effect today.

Stripped to its essentials, petitioners' suit attempts to resuscitate the FUTA tax coercion question that was resolved by the Court in *Steward Machine Co.* There, the Court held (301 U.S. at 585) that the FUTA tax "is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." Petitioners advance the identical arguments rejected in *Steward Machine Co.* For example, the employer in that case argued that the FUTA tax was only a "pretext to provide this plan for unemployment," and was a "tax club * * * sufficient to drive the States into line"; that "Congress was not seeking taxes for the Treasury * * * [but] was providing a plan for unem-

[8]Because of the similarity of the subject matter, we are serving a copy of our Motion to Dismiss in *State of New Hampshire* upon counsel for the petitioners in this case.

ployment," and that the states were coerced because otherwise "their citizens are compelled to supply millions of dollars to be used for the administration of agencies in other States that submit." (Summary from petitioner's brief, 301 U.S. at 551–553.)

But in *Steward Machine Co.*, the Court rejected the argument that the purpose of the statute was "to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government" (301 U.S. at 587). Petitioners' identical argument that the FUTA is unconstitutionally coercive is therefore foreclosed by *Steward Machine Co.* As the Court observed, in terms that govern this case as well (301 U.S. at 589–590; citation omitted):

> The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." * * * In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that

such a concept can ever be applied with fitness to the relations between state and nation.[9]

In *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 525–526 (1937), decided the same Term as *Steward Machine Co.*, the Court similarly upheld the constitutionality of the Unemployment Compensation Act of Alabama, stating that the federal unemployment compensation program "is not coercive in its operation."[10] Finally, as recently as two Terms ago, the Court described the current national unemployment scheme as "federal involvement primarily through *tax incentives* to encourage state-run programs" (emphasis supplied). *New York Tel. Co.* v. *New York Labor Dep't*, 440 U.S. 519, 537 n.28 (1979) (quoting from *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 483 (1977)).

It is therefore settled beyond serious question that the FUTA credit does not operate coercively upon the states. In so arguing, we do not suggest that the credit, and the several other substantial benefits to the states that arise from participation in the federal-state

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[9]The FUTA tax credit was modeled after the former federal estate tax credit (up to 80% of the federal tax) for payment of state inheritance taxes. S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935). The Court upheld that credit against the charge that it coerced Florida into enacting an inheritance tax and injured that State by inducing potential taxpayers to withdraw property from the State. *Florida* v. *Mellon*, 273 U.S. 12, 17–18 (1927). Cf. Section 2011 of the Internal Revenue Code of 1954 (26 U.S.C.).

[10]See also *Standard Dredging Co.* v. *Murphy*, 319 U.S. 306, 310 (1943), noting that the federal unemployment tax "from the nature of its ninety per cent credit device, is obviously an invitation to the states to enter the field of unemployment insurance."

unemployment compensation system,[11] do not present an attractive incentive. A tax credit that diverts billions of dollars of federal revenue to the states may be too attractive to decline. That fact, however, does not create an unconstitutional coercion. Tax incentives do not become penalties simply by reason of their attractiveness.

b. Nor is there any unconstitutional coercion involved in the provisions of the 1976 Amendments to FUTA that require unemployment coverage for state and local government employees as a condition for receiving the tax credits and grants. These conditions were enacted for the same compelling economic and social reasons that gave rise to the original federal unemployment legislation in the 1930's, viz., the need to relieve the burdens of unemployment. The conditions at issue thus stand on the same footing as the state requirements imposed in the original federal unemployment compensation program upheld in *Steward Machine Co.* and *Southern Coal Co.*

The 1976 Amendments represent Congress' determination that coverage of state and local government employees is a "legitimately national end"[12] as an essential means for combating the national economic, fiscal, and social consequences of unemployment. By 1976, 7.7 million state and local government workers did not have unemployment coverage. These employees constituted the largest group of workers not cov-

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[11] See *State of New Hampshire Dep't of Employment Security*, v. *Marshall*, *supra*, 616 F.2d at 246–247, n.10 (Pet. App. 19a–20a n.10).

[12] See *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. at 590–591.

ered by the regular system.[13] Two years earlier Congress had established the Special Unemployment Assistance Program,[14] which provided unemployment benefits for individuals generally not covered under state laws. Congress fully funded this program, and thereby provided hundreds of millions of dollars of direct federal grants to unemployed state and local government employees.[15]

In addition to these special benefits, Congress has expended additional hundreds of millions of dollars under the regular FUTA program to assist state governments. For example, in fiscal 1977 alone, the federal government paid more than $1.5 billion in direct grants to states for the administration of unemployment compensation programs and local public employment offices.[16] As of February 1, 1978, moreover, more than $4.9 billion in interest-free federal loans to states, for payment of unemployment benefits, were outstanding.[17]

Given these substantial federal grants both to state governments and unemployed state and local government employees, there is no basis for petitioners' contention that the statutory condition requiring the extension of unemployment coverage to such persons is

[13] S. Rep. No. 94–1265, 94th Cong., 2d Sess. 8 (1976).

[14] Emergency Jobs and Unemployment Assistance Act of 1974, Title II, 26 U.S.C. 3304 note.

[15] See H.R. Rep. No. 93–1528, 83d Cong., 2d Sess. (1954).

[16] *Dep'ts of Labor and Health, Education, and Welfare Appropriations for 1979: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 2d Sess., (Pt. 1), 191 (1978).

[17] *House Hearings, supra*, at 168–169.

an unrelated federal charge upon the state or its citizens, or is an impermissible federal regulation of the states. The federal government has spent billions of dollars in a federal-state cooperative program to combat unemployment. State coverage of state and local government workers is necessary to the success of that program, and a reasonable condition for participation in the program's enormous federal benefits.

c. Since the Federal Unemployment Tax Act is not a federal mandate imposed upon the states, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), has no bearing upon this case. *National League of Cities* involved the mandatory extension of federal minimum wage and maximum hour requirements to employees of state and local governments. The Court held that these mandatory requirements abridged the Tenth Amendment rights of the states. As the Court stated (426 U.S. at 852; footnote omitted): "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." (Footnote omitted.) Thus, *National League of Cities* addresses only the use of the federal commerce power[18] "to directly displace" traditional state government functions. It has no application to federal programs undertaken, at the option of the states, in response to federal incentives.

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[18]The Court confined the rationale of *National League of Cities* to Commerce Clause powers. It stated (426 U.S. at 852 n.17):

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations

A state either may accept the federal conditions, and thereby receive the statutory benefits, or it may decline to participate. An unbroken line of decisions of this Court has held such "conditional" federal benefit statutes to be constitutional. See, *e.g.*, *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 143–144 (1947).[19]

The foregoing analysis was recently upheld in *State of North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd, 435 U.S. 962 (1978). That case involved federal assistance to North Carolina under 42 health assistance programs. A principal requirement for such assistance was that the state establish a health agency to administer a certificate of need program for new institutional health services. But North Carolina's highest court had ruled that, under the State Constitution, a certificate of need statute was beyond the power of the State legislature. Accordingly, North Carolina challenged such a requirement as an unconstitutionally coercive effort to require the state to amend its constitution. The three-judge district court rejected the argument, ruling that the requirement was a condition upon federal assistance, and therefore was not coercive. As the court stated (445 F. Supp. at 535–536): "It must be remembered that this Act is not compulsory

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of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

[19] See also *City of New York* v. *Richardson*, 473 F.2d 923, 928 (2d Cir.), cert. denied, 412 U.S. 950 (1973).

on the State. Unlike the legislation faulted in *State of Maryland* v. *Environmental Protection Ag.*,* * * 530 F.2d 215 [(4th Cir. 1975) (emphasis in original)], it does not impose a mandatory requirement to enact legislation on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance."[20]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[20] The court also distinguished *National League of Cities* on the ground that it involved both direct regulation of the states and the Commerce Clause (445 F. Supp. at 536 n.10).

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SECTION 3310. Judicial Review.

(a) *In General.*—Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary of Labor. The Secretary of Labor thereupon shall file in the court the record of the proceedings on which he based his action as provided in section 2112 of title 28 of the United States Code.

(b) *Findings of Fact.*—The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the cause to the Secretary of Labor to take further evidence, and the Secretary of Labor may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) *Jurisdiction of Court; Review.*—The court shall have jurisdiction to affirm the action of the Secretary of Labor or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States

upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(d) *Stay of Secretary of Labor's Action.*—

(1) The Secretary of Labor shall not withhold any certification under section 3303(b) or section 3304(c) until the expiration of 60 days after the Governor of the State has been notified of the action referred to in subsection (a) or until the State has filed a petition for review of such action, whichever is earlier.

(2) The commencement of judicial proceedings under this section shall stay the Secretary of Labor's action for a period of 30 days, and the court may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights.

(e) *Preference.*—Any judicial proceedings under this section shall be entitled to, and, upon request of the Secretary of Labor or the State, shall receive a preference and shall be heard and determined as expeditiously as possible.

SECTION 7421. Prohibition of Suits to Restrain Assessment or Collection.

(a) *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed. * * *

28 U.S.C.:

SECTION 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SECTION 2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

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